No. 21,362

In the United States Court of Appeals for the Ninth Circuit

EXBER, INC., d/b/a EL CORTEZ HOTEL, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon petition of Exber, Inc., d/b/a El Cortez Hotel, pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), to review an order of the National Labor Relations Board issued on September 29, 1966 (R. 330-361, 384-385).[1]

[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R". References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr.". References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "GCX" or "RX" are to exhibits of the General Counsel or the Company (respondent below).

The Board's decision and order are reported at 160 NLRB No. 115. The Board has cross-petitioned for enforcement of its order in full (R. 394). This Court has jurisdiction over the proceeding, the unfair labor practices having taken place in Las Vegas, Nevada, where petitioner (the "Company" herein) operates a hotel and gambling casino. The Company here raises no issue of jurisdiction.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact.

The Board found that the Company violated Section 8(a)(1)[2] of the Act by coercively interrogating certain employees, threatening them with reprisals for engaging in union activities, and creating the impression that it was keeping the employees' union activities under surveillance. The Board also found that the Company discharged 5 employees because of their union adherence in violation of Section 8(a)(3) of the Act. The facts upon which the Board's findings are based are summarized below.

A. *The Company's business operation*

The Company, a Nevada corporation, is engaged in the operation of a hotel, restaurant, bar, and gaming casino in Las Vegas, Nevada (R. 6, 10). The Company's principal stockholders also have financial interests in other licensed gambling casinos in or near Las Vegas (R. 336). This proceeding concerns only the dealers in the Company's downtown gambling casino.

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[2] The relevant statutory provisions are printed *infra*, pp. 38-40.

The Company operates the gambling casino 24 hours per day, in 3 shifts. It employs approximately 45 dealers, who run games such as keno, blackjack, roulette, and craps. Approximately 40 percent of the Company's dealers are apprentices, or "break-ins." They start as "shills"—i.e., employees who start activity at inactive gaming tables—and earn from $10 per day to the maximum $22.50 a day the Company pays experienced dealers (R. 336).

B. *The Union organizes the Company's dealers and petitions for representation.*

In May 1964, the Union [3] launched a widespread effort to organize employees in the Nevada gambling casino industry (R. 337; Tr. 85, 281). The Union's efforts became common public knowledge in the area as a result of close coverage by local newspapers, television, and radio (R. 337; 235-236, 85). During this period, the Union sought to organize the Company's dealers. About May 10, 1964,[4] employees Louis Cantalamessa, Bob Jones, and Albert Alcini signed authorization cards and began to organize other employees (R. 343; Tr. 149-150), 185, 278). Within a few days after the organizing drive began, supervisor Albert Faccinto told Cantalamessa that he had heard "something about a union being organized" and that "I want you, Bob Jones, Pee Wee Alcini and my nephew to stay out of it until we find out what they are doing . . ." (R. 343; Tr. 285).[5]

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[3] The American Federation of Casino and Gaming Employees.

[4] Unless otherwise indicated, all dates are in 1964.

[5] Faccinto was from the same home town as the employees mentioned and had known them for most of his life (R. 343; Tr. 455-

On June 7, the Union held a meeting to establish a policy committee made up of representatives from each casino (R. 348; Tr. 185-187). Employee William Cox was designated as the representative for the Company's employees (R. 348; Tr. 187). On June 11, the Union notified the Company by registered letter that it "had been designated by a majority of your employees composed of dealers (including roulette, blackjack, '21', craps, poker and other dealers) as the collective bargaining representative of such employees." The Union requested a meeting with Company representatives for the purpose of negotiating a collective bargaining agreement (R. 337-338; GCX 2(a)). On June 15, after having received no reply from the Company with respect to the recognition request, the Union filed a petition for representation with the Board (R. 338; GCX 3).[6]

C. *Company official Musso singles out employee Cox as the Union instigator in the casino.*

On June 18, several employees who worked the No. 1 crap table on the graveyard shift (3:00 a.m. to 11:00 a.m.) were taking a break in the coffee shop when their shift boss, Thomas Musso, approached (R. 338; Tr. 108, 189). Musso asked employee Alfred Bellson

457). Faccinto stated that the Company was waiting to see if the gaming employees at the Golden Nugget joined a Culinary Union before it gave its employees "the word" (R. 343; Tr. 281).

[6] Before the Board, the Union's petition for representation at the Company was consolidated with similar petitions involving 8 other casinos. After a hearing, the Board concluded that it would effectuate the purposes of the Act to assert jurisdiction over the industry; it found that a question of representation existed; and issued a Decision and Direction of Elections. *El Dorado, Inc.*, 151 NLRB 579.

if he had joined the Union, and Bellson replied in the negative (R. 339; Tr. 108, 190). He then asked employee Cox if he had joined the Union (R. 339; Tr. 108, 190-191). Cox said he had not, although he had signed a card and was the representative of the employees on the Union policy committee (R. 339; Tr. 184-187). Bellson returned to work at that point, but Cox, who still had 20 minutes of rest period to go, continued the discussion with Musso (R. 339; Tr. 190-191, 108-109). Musso then said to Cox: "there has been many people fired out on the Strip because of this Union" (R. 339; Tr. 191).[7] Cox replied that he was unaware of this and stated that employees were protected by law from discharge for union activity. Musso said, "Well, nobody is going to tell me who I can hire and fire" (Tr. 191), and added that he was "not about to watch anybody for 30 days" in order to give him a trial period as demanded by the Union (Tr. 192). He said if the Union came in, the Company would "just take out the pit" (i.e. remove all games except slot machines). He added that the Company could hold out longer than could the employees "out on the street" (R. 339; Tr. 192-193). Musso said the Company did not need "the pit" because it could make money from the slot machines. He then expressed doubt that the employees would join the Union (Tr. 192-193). Cox replied that job security and pay raises might be persuasive to the employees, and Musso said, "You seem to know a hell of a lot about that Union not to be a member" (R. 339; Tr. 194). Cox then

[7] The "Strip" is a highway on the Las Vegas outskirts where the principal casinos are located.

went to the restroom prior to returning to work. Musso walked over to the No. 1 crap table in the casino, tossed out a roll of money and said to the employees working there: "I bet all of that against a penny that Cox is the instigator of this union activity" (R. 339; Tr. 136, 109, 170). Musso asked if there were any "takers"; receiving no answer, he said, "You're darn right, there is no takers", picked up his money, and walked away (R. 339; Tr. 109).

D. *The Company discharges employee Cox.*

About 4:00 a.m. on June 22, Cox was working as the stickman [8] at the No. 1 crap table (R. 346; Tr. 196-197). One of the players at the table placed a quarter bet for himself and offered another quarter as a tip for the dealers (Tr. 197).[9] Cox, understanding that the player was designating that the tip be bet in the same slot as his bet, wagered the quarter. The bet was lost, and nothing was said by Joe Chiara, the "box man" or table supervisor (Tr. 196-197, 198-199).[10]

About 7:30 that morning, Cox told Chiara that he

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[8] The stickman stands beside the crap table and moves the dice to the appropriate player.

[9] According to the Company's practice, all dealers share in all tips. When a player gives a tip to the crew, the stickman takes the money, puts it in his pocket until he leaves the table, and then puts the tip in a box; the tips are then allocated among the crew every 24 hours (R. 352, n. 17; Tr. 105). In some cases, the player designates that the tip is to be bet for the dealers; the player then must designate where the tip is bet. If the bet is won, the entire amount goes in the box (Tr. 105-106).

[10] The box man sits at the center of the crap table and presides over the game. His primary functions are to ascertain that cheating is avoided, to handle the money, and to assure that the payoffs are correct (R. 336). The Company admitted that box man Chiara was a supervisor (R. 7; Tr. 30-32).

thought two of the players at the table were underage. Chiara replied that it was not his job to watch out for minors but to check on crooked dice; nevertheless, he reported to Musso, who asked the minors to leave (R. 346; Tr. 198). Cox then remarked to Chiara that it was equally as bad to allow minors to gamble as to have crooked dice. Chiara told Cox that the matter was none of Cox's business, and then, referring to the earlier tip incident, remarked: "Furthermore, the next time somebody gives you some money, don't bet it for the dealers. Just stick it in your pocket. . . . If I was in on the tokes [tips], you could do things a little differently" (R. 346; Tr. 198-199).[11] Cox responded by directing an obscene remark toward Chiara (R. 346; Tr. 199).

For the remainder of that shift, Chiara said nothing to Cox. Chiara left the casino about 10:45 a.m., and Cox, accompanied by Bellson, left about 11:00 a.m. (R. 348; Tr. 200, 202, 609). About an hour later, Musso telephoned Bellson, erroneously thinking Cox roomed with him, and told him to tell Cox that he was discharged because of the trouble he had had with the box man (R. 347; Tr. 121). Cox, upon receiving the message, called Musso, who confirmed the discharge, giving as a reason that he was "tired of all of this stuff with Joe [Chiara]" (R. 347; Tr. 204).

Immediately after his discharge, Cox went to a union meeting scheduled for that afternoon (R. 348-349; Tr.

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[11] Chiara's last remark referred to the policy of not including the box man in the tips unless the player so specified (R. 352, n. 17; Tr. 106, 443). This practice was a source of annoyance to Chiara, who had sought on several occasions to get himself included in the dealers' tips (Tr. 106-107, 201).

205). He sought out Union Representative Thomas Hanley and informed him that he had been discharged. Hanley called Mr. Gaughan, the Company president, and arranged a meeting for the next day to discuss reinstatement of Cox (R. 349; Tr. 205-206). The meeting with Gaughan was held as scheduled on the following morning; Gaughan stated he had just returned from a trip and was not familiar with the details of the discharge; but he agreed to reinstate Cox immediately, placing him on the swing shift (7:00 p.m. to 3:00 a.m.) so as to avoid conflict with Musso (R. 349; Tr. 206-207, 364-365).

When Cox reported as instructed on the next day, June 24, Musso directed him to see Gaughan. Cox did, and Gaughan immediately said, "I hear you have been doing bad things" (R. 349; Tr. 208). Before he could elaborate, Musso approached and related the obscenity Cox had directed toward Chiara on the day of the discharge (R. 349; Tr. 208). Cox prevailed upon Gaughan to discuss the matter in private in Gaughan's office, and once there, related the facts which led up to the swearing incident. Gaughan's first response to this explanation, however, was to remind Cox that the "gambling business was a close-knit fraternity", and that if Gaughan so desired it "would be awfully difficult" for Cox to obtain further employment in the industry (R. 349; Tr. 209). He further stated that he relied heavily upon his subordinates and that a disagreement between his supervisors and the Union could lead him reluctantly to shut down, because "if it came to a showdown with the Union, he would rather close up the pit completely"

(R. 349; Tr. 210). Cox stated that he was interested only in going back to work and requested that Musso be called in to see if "some amicable agreement" could be worked out in that regard (R. 349; Tr. 210).

Musso and Donald Dobson, the Company's general manager, were summoned into the office, and Gaughan left to attend other business. Cox asked Musso if his discharge was related to their earlier (June 18) conversation about the Union. Musso angrily denied ever having a conversation with Cox about a union, and said, "If you say I did, Cox, I will kill you" (R. 349; Tr. 211). Dobson then spoke up, and told Cox he was terminated because of his attitude. He added: "Cox, you've got a big mouth. You think you are going to change the gambling industry overnight. We are going to be here long after you and the Union are forgotten" (R. 350; Tr. 212). Dobson further asked Cox why he wanted to "go back to work for someone who doesn't want you? You are working for Mr. Hanley [the Union agent] now" (R. 350; Tr. 213). During this same conversation, Musso told Cox that "We know all of the troublemakers in this club. We have all of their names. Why you were even sitting up on the stand at the last meeting [the Union meeting held a few hours after Cox's discharge]. I couldn't believe it" (R. 350; Tr. 212).[12] At this point Cox left the meeting; he told Hanley what had occurred and Hanley arranged a second meeting with Gaughan for the following day (R. 350; Tr. 214).

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[12] Musso's remark apparently refers to Cox's seat, as a member of the Union's policy committee, on the raised platform at that meeting (Tr. 188-189).

Hanley, Cox, and two Union representatives met with Gaughan the following afternoon, June 25. Cox mentioned to Gaughan that Musso had threatened to kill him. Gaughan expressed his awareness of the threat, and acknowledged that Musso had a bad temper. But Gaughan stated that it was up to Musso as to whether or not Cox was rehired, because Musso had threatened to quit if Cox were rehired and he "didn't want to disorganize or disrupt his whole organization just to rehire one man" (R. 350; Tr. 214-215).

Musso and Dobson entered the room at that point, and the parties discussed the reasons behind Cox's discharge. When Cox inquired if his termination was related to his earlier conversation with Musso about the Union, Musso denied the conversation, called Cox a "damn liar", and then directed obscenities at Cox (R. 350; 216, 370). Musso later asserted that the sole reason for the discharge was Cox's trouble with Chiara. At Cox's request, Chiara was then called into the meeting. Musso asked Chiara if he had had trouble with Cox, and Chiara replied that he "had trouble with all them [the dealers] . . . They all give me a bad time." (R. 350; Tr. 217-218).[13] Answering a question from Hanley, Chiara stated that he had no objection to Cox's reinstatement, but asked that Cox be put on another

[13] There had been considerable friction between Chiara and the dealers during the few months Chiara had been on the job, both for reasons of personality and because of Chiara's insistence that he be included in the tips (R. 345; Tr. 102-103, 106-107, 443). On several occasions, Chiara became so disturbed by disagreements with dealers that he walked out of the casino. This happened in disputes with dealers Kabush and Threadwell on separate occasions, and again on June 21 (R. 345-346; Tr. 102-103, 216, 226-227, 372, 435-436). Musso spoke to the dealers on several occasions in an effort to secure a more harmonious relationship with Chiara (R. 346; Tr. 93).

shift. He stated that Cox was a competent and honest worker, and was not the only one to use profanity (R. 350; Tr. 218, 372). Musso stated his objection to reinstating Cox, and the meeting ended with Gaughan promising to make a decision the next day (R. 351; Tr. 218). On June 26, Gaughan informed Hanley that he would not reinstate Cox (R. 351; Tr. 375-376).

E. *Company officials question other employees regarding their union adherence.*

On June 23, Albert Faccinto, shift boss of the day shift, approached one of his employees, Louis Cantalamessa.[14] Faccinto took Cantalamessa to a private spot in the casino and said, "Lou, I want the truth. Did you join the union?" Cantalamessa falsely answered that he had not, and Faccinto replied, "If you did join the union, it would hurt me" (R. 343; Tr. 288-290).

About the same time, Rocco Paravia, shift boss for the swing shift, saw employee David Waggoner talking to a well-known Union organizer in the hotel. When Waggoner returned to the pit, Paravia asked, "You are not fooling with this Union, are you?" (R. 344; Tr. 315-319, 449-450). Waggoner, who had signed a card in June and had persuaded other employees to join the Union (Tr. 314-315), replied "if I were going to steal, I surely wouldn't put it on the microphone." Paravia responded, "It is worse than stealing" (R. 344; Tr. 317). Paravia also inquired of employee Al-

[14] Cantalamessa, one of the early Union adherents, had obtained approximately 15 signed authorization cards from Company employees, and had been engaged in an earlier discussion about the Union with Faccinto (*supra,* p. 3). He had attended a union meeting on June 22 (Tr. 290), the meeting which Musso referred to in telling Cox he had been observed on the "stand" (*supra,* p. 9).

cini: "Do you belong to the Union?" (R. 344; Tr. 146-147). Alcini denied that he had joined and Paravia walked away (R. 344; Tr. 147).

F. *The Company closes a portion of its operations, discharges 4 Union adherents, and shortly thereafter reopens the operation.*

On June 28, the Company decided to discontinue the operation of its No. 2 crap table on weekdays, assertedly because it was not profitable to do so, and to operate the table only on weekends (R. 352-353; Tr. 536-537, 516).[15] Although the Company had staffed the No. 2 table during the weekdays with 3 "break-ins" and one experienced dealer, it discharged 4 experienced dealers (Louis Cantalamessa, David Waggoner, Robert Jones, and David Conner) when it closed down its weekday operation (R. 352-353; Tr. 183, 113, 279, 311-312).[16] None of the dischargees regularly worked on the No. 2 table, although Jones and Waggoner occasionally helped out there (Tr. 277-279, 310-313). Three of the discharged employees, Cantalamessa, Waggoner, and Jones, were, along with Cox, the leading union adherents and organizers among the Company's employees; and Conner also participated in the Union drive (R. 355; Tr. 292, 314-315, 317-318, 395-397).

The No. 2 table remained closed on weekdays during

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[15] The Company operates the No. 1 table 24 hours per day. It had operated the No. 2 table only on weekends until some time in May, when it decided that it would be profitable to open the No. 2 table on weekdays from 3:00 p.m. to 11:00 p.m. It accordingly began operating the No. 2 table during these hours on June 4 (R. 352-353; Tr. 181, 183, 513-515, 517-522).

[16] Conner earned $20.50 per day, and the others received top pay for dealers, $22.50 per day (Tr. 601, 312, 279, 280).

July. On August 1, the Company again opened the table on an everyday basis, and operated it that way the remainder of the year (R. 352-353; RX 8-12).

II. The Board's Conclusions and Order.

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that the Company violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activities, by threatening them with reprisals, and by creating the impression of surveillance of their union activities. The Board further concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees William Cox, Louis Cantalamessa, Robert Jones, David Conner and David Waggoner because of their union activities.

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing the employees in the exercise of their rights under the Act. Affirmatively the order requires the reinstatement of the five employees with back pay and the posting of the usual notices (R. 384-385, 330-361).

SUMMARY OF ARGUMENT

I. The Board properly concluded from the credited evidence that the Company violated Section 8(a)(1) of the Act. Immediately after the Union filed a petition for representation, Company officials questioned employees as to their union adherence, announced that other casinos had discharged employees because of the Union, and threatened to close down "the pit" (the gambling area) before allowing it to become organized.

A Company official offered to bet a group of employees that employee Cox was the "instigator" of the union activity, told employees on different occasions that he knew who the union adherents were, and told employee Cox that he had been observed at the most recent union meeting. The Board concluded from the foregoing conduct that the Company had coercively threatened and interrogated the employees, and had created the impression that the employees' union activities were under surveillance.

II. Substantial evidence supports the Board's finding that the Company discharged employee Cox because of his union activities, and not because of an obscene remark he made to a supervisor during a quarrel about their work. Cox was a leading union adherent who had held union meetings in his home, had persuaded other employees to sign authorization cards, and was the employees' representative on the union policy committee. Several days prior to Cox's discharge, Supervisor Musso interrogated Cox about his union activity and threatened that the "pit" would be closed before the Company would recognize the Union. A few minutes later, Musso offered to bet a roll of money that Cox was the "instigator" of the union activity in the casino. Cox was discharged shortly thereafter, assertedly because of his remark to another supervisor. Cox sought to appeal his discharge, but was told by the general manager that the Company did not want him, and that he was working for the Union now. The general manager also told Cox, "You think you are going to change the gambling industry overnight. We are going to be here long after you and the Union are

forgotten." Company President Gaughan denied Cox's request for reinstatement, stating that he would close the "pit" completely if it came to a showdown with the Union. Gaughan also informed Cox that the gambling industry was a "close-knit fraternity" and that it would be difficult for Cox to obtain further employment in the industry if Gaughan so desired.

Furthermore, in view of other relevant facts, the Company's objection to Cox's remark appears to be no more than a pretext for discharging him. Chiara, the supervisor at whom the remark was directed, informed the Company officials at the reinstatement meeting that he had no objection to Cox's reinstatement, that Cox was a competent and honest worker, and that Cox was not the only employee who used profanity. Moreover, Chiara, in just a few months with the Company, had been involved in three other incidents, with employees other than Cox, which caused him to walk off the job in anger and leave the casino. No such reaction followed Cox's remark. Chiara also declined to single out Cox as a trouble-maker, but stated that he (Chiara) had trouble with all the dealers.

III. Substantial evidence supports the Board's conclusion that the Company discriminatorily discharged employees Cantalamessa, Jones, Conner, and Waggoner. Each of these employees participated in the union's organizing drive; and the evidence positively shows that Cantalamessa, Jones and Waggoner were, along with Cox, principally responsible for organizing the other employees for the Union. Company officials threatened and interrogated some of these dischargees as well as other employees shortly before the dis-

charges, and Supervisor Musso stated on several occasions to different employees that he knew just who the union adherents were. Three of the dischargees received the top pay for dealers of $22.50 per shift, and the fourth dischargee received $20.50.

The Company's explanation for the discharges does not withstand scrutiny. It asserted that it discharged these four employees on June 28 when it decided to close down the weekday operation of the No. 2 crap table because it was unprofitable and to discharge employees to meet the "automatic overstaffing" that resulted. None of the dischargees worked on that operation. Company records do not support the Company's contention that the weekday operation of the No. 2 table was unprofitable. That table earned more than $15,000.00 in June, the only month it had operated on weekdays. Yet, when the Company reopened the weekday operation of the table a month later, it kept it open even though it earned only about $3,000.00 the first month and lost money every month thereafter. Moreover, the Company asserted that the volume of business handled on the table was not sufficient to justify keeping it open, but the volume of business on the table was no greater during the period thereafter when the Company kept the table open month after month. Furthermore, Company records indicate that conditions were less favorable, under the Company's own standards, for reopening the table in August than for originally opening it in June. The Company never adequately explained why it reopened the table under these circumstances, just a month after it had closed the table because it was "unprofitable."

The Board also found that without regard to the validity of the Company's motive in shutting down table No. 2, the reasons given by the Company for singling out the four union adherents for discharge were inconsistent, contradictory and unconvincing in light of the entire record, and concluded that these reasons were not sufficiently credible to dispel the prima facie case of discriminatory motive which the General Counsel had established.

IV. The Board rejected two procedural objections raised by the Company. (1) The Board properly allowed an amendment to the complaint to include two dischargees listed on an amended charge. Although the amended charge was filed more than six months after the discharge, it was not time-barred by Section 10(b) of the Act. The amended charge related back to the original, timely charge, which alleged the same violations of the Act as to other employees for the same incident, the closing of the weekday operation of the No. 2 table. Since the law recognizes that the charge in these cases serves merely to set in motion the Board's investigatory machinery, and is not to be construed as binding as a pleading in private litigation, courts have found it permissible for the amended charge to "relate back" to the time of the original charge. (2) The Board properly upheld the discriminatory discharges of employees Conner and Jones despite their failure to testify at the hearing. Credible evidence established their participation in the organizing drive and the Company's unlawful motivation for the discharges. Their testimony was not essential to finding discriminatory motive because that is a fact as

to which the employer alone, not the employees, has particular knowledge. In any event, Jones had moved out of the state and could not be located at the time of the hearing, and Conner was unavailable when the General Counsel called him to testify.

ARGUMENT

I. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(1) of the Act by Interrogating and Threatening Its Employees Regarding Their Union Activities, and by Creating the Impression of Surveillance Over These Activities.

As shown in the Statement, the Company immediately sought to determine the source and extent of union adherence among its employees and sought to discourage such adherence as soon as it became aware of the Union's organizing drive. Instead of conducting its campaign within permissible limits, Company officials interrogated employees regarding their union activities without assurances against reprisals, threatened that a shut down or discharges would follow the Union's advent, and indicated that the employees' union activities were under surveillance. As we show below, the Company's conduct plainly discloses a pattern of unlawful interference with the employees' organizational rights, and the Board properly held that the Company violated Section 8(a)(1) of the Act.

Thus, according to the credited testimony, three days after the Union filed a representation petition with the Company and had requested bargaining, shift boss Musso asked employees Cox and Bellson if they had joined the Union (R. 339; Tr. 108, 190-191, 184-187). After Cox falsely replied in the negative, and

Bellson walked away, Musso informed Cox that "many people" on the Strip had been fired "because of this Union" (R. 339; Tr. 191). Musso thereafter announced that the Company "would take out the pit" before it would become organized, and that the Company "could last a lot longer" than could the employees out on the street (R. 339; Tr. 192-193). Musso's remarks comprise bald threats of reprisal contingent solely upon the advent of the Union, and are thereby violative of the Act; and the interrogation of the employees, in this context, could have no other effect than to "impede and coerce the employees in their right of self-organization." *N.L.R.B.* v. *Nabors,* 196 F. 2d 272, 275, (C.A. 5), cert. denied, 344 U.S. 865. Accord: *N.L.R.B.* v. *Ambrose Distributing Co.,* 358 F. 2d 319, 320-321 (C.A. 9), cert. denied, 385 U.S. 838; *Bon Hennings Logging Co.* v. *N.L.R.B.,* 308 F. 2d 548, 552-553 (C.A. 9); *N.L.R.B.* v. *Price Valley Lumber Co.,* 216 F. 2d 212, 215-216 (C.A. 9), cert. denied, 348 U.S. 943; *N.L.R.B.* v. *Howard-Cooper Corp.,* 259 F. 2d 558, 560-561 (C.A. 9).

Moreover, testimony explicitly credited by the Trial Examiner shows that during this period other Company officials also interrogated employees about their union adherence: shift boss Faccinto, after earlier having told employee Cantalamessa to "stay out" of the Union, inquired if Cantalamessa had joined the Union (R. 343; Tr. 288-290, 281); and shift boss Paravia asked employees Alcini and Waggoner on separate occasions if they had joined the Union (R. 343-344; Tr. 314-319, 449-450, 146-147). In none of these instances did the Company offer assurances against reprisal, and in each instance, as in the questioning

of employee Cox, the employee falsely denied having engaged in Union activity (supra, pp. 5, 11-12). The presence of these factors renders the "coercive effect" of such questioning "more likely." *N.L.R.B.* v. *Camco, Inc.,* 340 F. 2d 803, 806-807 (C.A. 5), cert. denied 382 U.S. 926, and cases cited therein. This and other courts have found similar interrogation to be violative of the Act "because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B.* v. *West Coast Casket Co., Inc.,* 205 F. 2d 902, 904 (C.A. 9), and cases cited therein. See also, *N.L.R.B.* v. *Camco, Inc., supra; Martin Sprocket & Gear Co.* v. *N.L.R.B.,* 329 F. 2d 417, 419-420 (C.A. 5); *Daniel Construction Co.* v. *N.L.R.B.,* 341 F. 2d 805, 812 (C.A. 4), cert. denied, 382 U.S. 831; *Edward Fields, Inc.* v *N.L.R.B.,* 325 F. 2d 754, 758-759 (C.A. 2). Cf., *Bourne* v. *N.L.R.B,* 332 F 2d 47, 48 (C.A. 2). Accordingly, we submit that the record amply supports the Board's findings that the Company's interrogation violated Section 8(a)(1) of the Act.

Furthermore, the conduct of Musso on several occasions indicated to the employees that their union activities were under surveillance. Several days prior to Cox's discharge, Musso tossed a roll of money on a table in front of several employees and offered to bet the roll "against a penny" that Cox was the instigator of the union activity; when no one answered, Musso exclaimed, "You're darn right, there is no takers," picked up his money and left (R. 339; Tr. 109, 170, 136). And on the day after Cox's discharge, Musso informed him that he had been observed sitting on the

stage at a union meeting (R. 350; Tr. 212). Musso also stated to different employees on several occasions that he knew who the union adherents were (Tr. 373, 212, 110-111). We submit that the Board properly concluded from these facts that such conduct gave the impression of surveillance of the employees' union activities, and thereby coerced or restrained employees in violation of section 8(a)(1) of the Act. See, *N.L.R.B.* v. *Prince Macaroni Mfg. Co.,* 329 F. 2d 803, 805-806 (C.A. 1); *N.L.R.B.* v. *S & H Grossinger's Inc.,* 372 F. 2d 26, 28 (C.A. 2); *Hendrix Mfg. Co.* v. *N.L.R.B.,* 321 F. 2d 100, 104-105 (C.A. 5); *International Union of Electrical, etc., Workers* v. *N.L.R.B.,* 352 F. 2d 361, 362 (C.A. D.C.), cert. denied, 382 U.S. 902, enforcing 147 NLRB 809, 820 (statement that Company knew who signed cards); *N.L.R.B.* v. *Gotham Shoe Mfg. Co.,* 359 F. 2d 684, 685 (C.A. 2), enforcing, 149 NLRB 862, 869, 870 (statement that Company knew how many employees attended a union meeting).[17]

The Company in its brief does not raise issue with the conclusions the Board drew from these facts; instead, it argues that the Trial Examiner and the Board erred in making credibility resolutions as to what were the facts (Br., pp. 19-28). We submit that

[17] The Fifth Circuit in *Hendrix Mfg., supra,* reasoned (321 F. 2d at 104, n. 7):

> Surveillance becomes illegal because it indicates an employer's opposition to unionization, and the furtive nature of the snooping tends to demonstrate spectacularly the state of the employer's anxiety. From this the law reasons that when the employer either engages in surveillance or takes steps leading his employees to think it is going on, they are under the threat of economic coercion, retaliation, etc.

this argument raises no issue of merit. The law is settled that credibility resolutions are matters for the Examiner and the Board and that absent extraordinary circumstances a court upon review will not re-evaluate the testimonial conflicts. *R. J. Lison Co., Inc.* v. *N.L.R.B.*, 379 F. 2d 814, 817-818 (C.A. 9); *N.L.R.B.* v. *Thrifty Supply Co.*, 364 F. 2d 508, 509 (C.A. 9); *N.L.R.B.* v. *Carpenters Local No. 2133,* 356 F. 2d 464, 466 (C.A. 9); *N.L.R.B.* v. *Radcliffe,* 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; *N.L.R.B.* v. *Luisi Truck Lines,* — F. 2d —, No. 21554, Oct. 27, 1967 (C.A. 9). The Trial Examiner here, affirmed by the Board, carefully resolved the testimonial conflicts with reference not only to the content of each witness' testimony but also to their respective demeanor upon the witness stand (R. 339-344). The Company cites no credited testimony which "carries its own death wound" and can show no discredited evidence which "carries its own irrefutable truth." *N.L.R.B.* v. *Pittsburgh Steamship Co.,* 337 U.S. 656, 660, quoting from *N.L.R.B.* v. *Robbins Tire & Rubber Co.,* 161 F. 2d 798,

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[18] In an attempt to show that the credited testimony suffers from "inherent incredibility" (Br. p. 28), the Company overlooks and misstates salient factors. E.g., in faulting the Examiner's crediting of Cantalamessa over Faccinto (Br., pp. 19-21) the Company does not mention that it called Faccinto to the stand, that he admitted that he "probably" talked to Cantalamessa about the Union, and that he failed to deny any of the statements made by Cantalamessa (R. 343; Tr. 454-459). Moreover, contrary to the intimations in the Company brief (p. 20), the record shows no material inconsistency between Cantalamessa's testimony and his pre-hearing affidavit (Tr. 276-305); and it also shows that Faccinto *did* have a relative, a brother-in-law, working at the Company (Tr. 457). Further, there is no merit in the Company's attempt (Br. p. 21) to assail the testimony of Waggoner because the General Counsel did not call Union agent Scott to corroborate it, for the record plainly shows that Scott was not present when Paravia questioned Waggoner

800 (C.A. 5).[18] Indeed, the Examiner's report indicates a thoughtful and reasonable evaluation of the conflicting testimony, and his resolutions of credibility are therefore entitled to stand.

II. Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Five Employees Because of Their Union Activities.

Within two weeks after the Union demanded recognition as the majority representative among the Company's gambling casino employees, the Company discharged 5 employees, all union adherents. According to the Company, the discharges were all for legitimate business considerations; but the Board found that the asserted reasons for the discharges were pretexts, and that the Company, in reality, discharged the employees because of their union activities.

The determinative question in cases such as this is one of fact—i.e., what was the "actual motive" for the discharge. *Shattuck Denn Mining Corporation* v. *N.L.R.B.,* 362 F. 2d 466, 470 (C.A. 9). In determining this question, the Board is entitled to rely upon circumstantial as well as direct evidence, and its inference of motivation must stand where it is reasonable and supported by substantial evidence on the record con-

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(Tr. 316-317). Finally, the Company's list of immaterial inconsistencies (Br. pp. 21-28) relating to the credited version of Musso's conduct on June 18 is likewise assailable, but interests of space and relevance require they not be set forth here. It is sufficient to say that the Examiner found Musso's demeanor "not of a character to inspire confidence" and his testimony "evasive", and discredited his testimony accordingly (R. 342).

[19] Accord: *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488; *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 553-554 (C.A. 9); *N.L.R.B.* v. *Mrak Coal Co., Inc.*, 322 F. 2d 311, 313, 314

sidered as a whole. Id. at 470.[19] In determining the substantiality of the evidence upon review, the applicable principles are familiar:

> * * * the court's province is confined to a determination of whether on the record as a whole, including of course the Respondent's evidence, the evidence upon which the Board based its finding was substantial. In doing that the court must make a comparison, not for the purpose of determining which contention is supported by the greater weight of the evidence, but in order to determine whether the evidence relied on by the Board is substantial in relation to the whole. [Citations omitted.] Respondent's evidence on the foregoing issues is, to us, persuasive, to say the least. But there was substantial evidence to the contrary. Under these circumstances the Board's finding of fact is conclusive. [*N.L.R.B.* v. *Injection Molding Co.*, 211 F. 2d 59, 62 (C.A. 8).][20]

Thus, in accord with this statement, it is settled law that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 405. We submit that pursuant to these principles the Board's finding of

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(C.A. 9); *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 906-907 (C.A. 9); *N.L.R.B.* v. *Melrose Processing Co.*, 351 F. 2d 693, 698 (C.A. 8).

[20] Accord: *N.L.R.B.* v. *Pine Products Corp.*, 361 F. 2d 480 (C.A. 9), and cases cited *supra*, n. 19.

discriminatory motive here is amply supported by the record, is reasonable, and is therefore entitled to enforcement.

A. *The discharge of employee Cox.*

It is clear from the record that Cox was a leading union adherent among the Company's employees. He signed a card early in the campaign, attended union meetings, held union meetings in his home, persuaded other employees to sign authorization cards, and was the representative among the Company's employees on the Union's policy committee (R. 348; Tr. 184-187, 395-397).

It is equally clear that the Company was aware of Cox's union adherence, or at least believed that he was responsible for the Union's advent in its casino. Thus, Musso stated on several occasions to different employees that he knew who the union adherents were (Tr. 373, 212, 110-111). Moreover, shortly before Cox's discharge, Musso approached a group of employees and offered to bet a roll of money that Cox was the "instigator" of the union activity in the casino (*supra,* pp. 5-6).

Within a few days of this incident, Cox was discharged, assertedly because he made an obscene remark during a work-related quarrel with a supervisor. Although Cox's remark may have provided a justifiable ground for discharge, we submit that the evidence in this case amply supports the conclusion of the Board that the Company's motivation in discharging Cox was actually to rid itself of the "instigator"

of the union activities, not because of the remark.[21] Indeed, this Court has found the presence of the factors discussed above—i.e., the employer's knowledge of the employee's union adherence, coupled with the timing of the discharge—to be persuasive in inferring discriminatory motive "notwithstanding the existence of justifiable grounds which, under other circumstances, might have permitted dismissal." *N.L.R.B.* v. *Tonkin Corp. of California,* 352 F. 2d 509, 511 (C.A. 9). Moreover, the record here plainly shows the Company's hostility toward the Union, couched in warnings that employees at other casinos had been discharged because of union activities, threats to close down the casino operations if the Union came in, and coercive interrogation of employees regarding their union adherence (*supra,* pp. 18-21). Significantly, as discussed above, Cox was the recipient of much of this hostility shortly prior to his discharge.

More important, that it was Cox's union activity which actually brought about his dismissal is vividly evidenced by the statement of Company officials when Cox sought to appeal his discharge. The Company general manager, Dobson, in a conversation with Cox about his discharge stated that Cox was discharged because of his attitude; but Dobson then went on to establish what he meant, stating "Cox, you've got a big mouth. You think you are going to change the

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[21] This court has often stated that "the existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N.L.R.B.* v. *Security Plating Company,* 356 F. 2d 725, 728 (C.A. 9), and cases cited therein. Accord: *Aeronca Mfg. Co.* v. *N.L.R.B.,* — F. 2d — (C.A. 9) (decided Nov. 1, 1967, Docket No. 21,305).

gambling industry overnight. We are going to be here long after you and the Union are forgotten" (R. 350; Tr. 212). It was at this point that Dobson asked Cox why he wanted to work for "someone who doesn't want you? You are working for Mr. Hanley [the Union agent] now" (R. 350; Tr. 213). At this same meeting, Musso informed Cox that the Company knew the names of all the "trouble-makers" in the club, and then informed Cox that he had been observed sitting on the stage at the last Union meeting (R. 350; Tr. 212). And when Cox discussed his discharge with Gaughan, the Company president, explaining what had provoked him to make the obscene remark, Gaughan's response was solely in the context of union activities. Gaughan stated that the "gambling business was a close-knit fraternity", that if Gaughan so desired it "would be awfully difficult" for Cox to obtain further employment in the industry, and that "If it came to a showdown with the Union" he would rather close the "pit" completely (R. 349; Tr. 208-210).

Furthermore, under the circumstances, the Company's objection to Cox's remark appears exaggerated. Chiara, the individual at whom the remark was directed, had no objection to Cox's reinstatement and informed Company officials of this 2 days after the incident. He even stated on that occasion that Cox was a competent and honest worker, and was not the only employee to use profanity (R. 350; Tr. 218, 372). Also, in his few months on the job Chiara had been involved in three other incidents, with employees other than Cox, which caused him to walk off the job in anger and leave the casino; no such reaction followed Cox's

remark (*supra,* p. 10, n. 13). Finally, at the reinstatement discussion, Chiara declined to single out Cox as a trouble-maker, but said that he (Chiara) "had trouble" with all the dealers (*supra,* p. 10).[22]

In sum, we submit there is substantial evidence on the record as a whole to support the Board's finding. In light of the Company's belief that Cox was the Union "instigator", its hostility to the Union's advent, its coercive threats and interrogation of Cox and other employees immediately around the time of Cox's discharge, the timing of the discharge in relation to the Company's knowledge of the union activities, and the statements of Company officials after the discharge linking Cox with the Union, the Board was clearly justified in finding that the discharge was motivated by discriminatory reasons.

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[22] The argument made in the Company's brief (Br. p. 10)—that Chiara discharged Cox directly as a result of the swearing incident —is based solely on evidence which was explicitly discredited by the Trial Examiner and the Board (R. 347-348, 351-352), and is therefore without force here. This Court has long ruled that it is not "obliged to give weight to testimony which the Board, in the rightful exercise of its function as arbiter of the facts, rejected as not worthy of credit." *N.L.R.B.* v. *Radcliffe,* 211 F. 2d 309, 315 (C.A. 9), cert. denied, 348 U.S. 833; and cases cited *supra.* p. 22. Moreover, in making this resolution, the Examiner properly drew an adverse inference from the company's refusal to call Chiara, a management representative who was present at the hearing (Tr. 240), to corroborate its story. See, *N.L.R.B.* v. *Radcliffe, supra,* 211 F. 2d at 315; *Paudler* v. *Paudler,* 185 F. 2d 901, 903 (C.A. 5), cert. denied, 341 U.S. 920; *Interstate Circuit* v. *U.S.,* 306 U.S. 208, 225-226.

B. *The discharges of employees Cantalamessa, Jones, Conner and Waggoner.*

As shown in the Statement, less than a week after Cox's discharge, the Company discontinued the weekday operation of the No. 2 crap table, and discharged 4 employees, all union adherents; it reopened the operation about a month later, without recalling the discharged employees (*supra,* pp. 12-13).[23] The Board found that the evidence belied the Company's contention that its closing of the table was economically motivated, and concluded that the Company singled out the 4 employees for discharge because of their union adherence. Relevant record evidence establishes a prima facie showing of discriminatory motivation behind these discharges. Thus, three of the dischargees, Cantalamessa, Jones, and Waggoner, along with Cox, were the employees principally responsible for the organization of the Company's employees; and the fourth dischargee, Conner, participated as well (Tr. 292, 313-315, 317-318, 395-397). As discussed above, Supervisor Musso stated to different employees on several occasions prior to the discharges that he knew who the union adherents were (Tr. 212, 110-111, 373), and Company officials engaged in coercive threats and interrogation of some of the dischargees and other employees shortly before the discharges were effected (*supra,* pp. 18-21). Moreover, none of the dischargees worked on the No. 2 table, which was operated primar-

[23] The discharges occurred June 28. The Company had decided in May to operate the No. 2 table for a weekday shift from 3 p.m. to 11 p.m. Until then, the No. 2 table had been open only on weekends. The No. 1 table was open 24 hours per day, 7 days per week (*supra,* p. 12, n. 15).

ily by "break-ins", but were singled out for discharge even though they were top-rated dealers (*supra,* p. 12).[24] Furthermore, the timing of the discharges—less than two weeks after the Union's petition for representation—and the Company's hostility to the Union are relevant evidence of discriminatory motive (*supra,* pp. 26, 18-21).

More important, the reason advanced by the Company for discontinuing the weekday operation of the No. 2 table "fails to stand under scrutiny," and thereby further evidences discriminatory motive. *N.L.R.B.* v. *Dant & Russell,* 207 F. 2d 165, 167 (C.A. 9). First, the Company contends that it closed down the weekday operation of the No. 2 table on June 28 because it found the operation unprofitable (R. 353; Tr. 517-519). Yet, Company records show that the No. 2 table had winnings of $15,415.00 in June, when it was kept open on weekdays; later, after the table was reopened on weekdays, the Company kept it open although it earned only $3,360.00 in August and consistently *lost* money each month throughout the remainder of the year (R. 353-354; RX 6-12). Also, Company records counter the Company's assertion (Br. pp. 14-15) that the volume of business on the No. 2 table, averaging about $1,000.00 per shift, was insufficient to justify the continued operation of the table: these records show that during the period after the table was reopened in August, the $1,000 volume was rarely reached except for weekends, but the Company kept the table open

[24] Three of the discharges received top pay of $22.50 per shift, and Conner received $20.50 per shift (Tr. 601, 312, 279, 280).

throughout the period (RX 8-12).[25] Moreover, the Company's reopening of the table in August appears implausible in light of the reasons given for originally opening the table on weekdays. The Company asserted that it decided in May to open the table on weekdays because the volume of business on the No. 1 table was high and because it anticipated that the volume would increase sufficiently to accommodate another table (R. 353; Tr. 513-515). But the conditions in July (the month upon which the Company based its decision to reopen) were less favorable than in May,[26] and no sound reason was offered to explain why the Company, after purportedly closing down the table in June because it was "unprofitable," would reopen the table a month later (R. 353-354).[27] Accordingly, in light of

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[25] E.g., in August, the volume of business on No. 2 was less than $1,000.00 on 20 of the 28 days it was open on the day shift, and on 17 of the 27 days it was open on the swing shift (RX 8); in September, the volume of business was less than $1,000.00 in 21 of 29 days shifts, and 16 of 24 swing shifts (RX 9). The figures for October, November, and December are similar (RX 10-12).

[26] Company records show that the volume of business on the day and swing shifts on table No. 1 in July was $30 *less* than the volume in May, and the weekend earnings on No. 2 table were $6,000 less in July than in May (R. 353-354; RX 5, 7, 17, 19). Thus, the Company cannot contend that a greater volume of business justified the reopening in August.

[27] The explanation in the Company's brief (p. 17) of the August reopening is misleading. The Company there contends that a lower overhead was created by (1) reducing the bet limit and by (2) using "break-in" dealers. However, the record shows that the bet limit was reduced in May (Tr. 516), and thus was in effect when table No. 2 was in operation in June, and that "break-ins" were also used on No. 2 in June (R. 352-353; Tr. 183, 113, 279, 311-312). Therefore, both factors urged in the Company's brief as creating a lower overhead were present during the June operation of No. 2 table on weekdays.

the Company's failure adequately to explain why it closed down the weekday operation of table No. 2, its failure to explain why it reopened that operation, and the evidence of discriminatory motive in discharging the 4 employees upon shutting down the weekday operation, we submit that the evidence amply supports the Board's finding that the Company was not motivated by economic reasons in closing the No. 2 table and discharging the four employees, but instead was motivated by a desire to rid itself of union adherents.[28]

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[28] In any event, without regard to the Company's motive in shutting down the weekday operation of table No. 2, the Board found that the individual reasons given by the Company for singling out the 4 dischargees were not sufficiently credible to dispel the prima facie case of discriminatory motivation established by the General Counsel (R. 354-356). Thus, the Company's contention that Jones was discharged because he was the "youngest $22.50 crap dealer" (R. 354; Tr. 545) is belied by evidence that two other dealers were hired at $22.50 after Jones was hired on December 3, 1963 (Tr. 564, 570-571, 564). Nor is there merit to the Company's contention that Cantalamessa was discharged because of incidents relating to his honesty, or that Waggoner was discharged because of a drinking problem. The Company never mentioned its dissatisfaction to these employees, paid them the highest wages of any dealers, and endured the alleged problems until their union activities came to light (R. 354-355; Tr. 568- 569, 323-325, 542-544). And the vague contention that Conner was discharged because "he wasn't coming along good enough" (Tr. 545) is further weakened by evidence that the Company paid Conner next to top pay for dealers. Therefore, in the absence of convincing reasons for singling out the four dischargees, the Board concluded that discriminatory motive was established even if the closing of the No. 2 table was motivated solely by legitimate business considerations (R. 356). See, *N.L.R.B.* v. *Radcliffe, supra,* 211 F. 2d at 313-314 (C.A. 9); *N.L.R.B.* v. *Jackson Tile Mfg. Co.,* 282 F. 2d 90, 92-93 (C.A. 5).

C. *The Company's procedural objections to the findings as to employees Waggoner, Conner, and Jones are without merit.*

In the brief, the Company contends that procedural infirmities should void the Board's findings as to three of the discharges. As we discuss below, none of its contentions are meritorious in the circumstances here.

1. The Company contends (Br. pp. 6-7) that the Board erred in allowing an amendment to the complaint in July 1965 to include employees Conner and Waggoner, who were discharged in June 1964. The Company's contention is that the discharges occurred more than six months prior to the filing of an amended charge, and therefore are time-barred under Section 10(b) of the Act.[29] This contention is without merit, however, as the original charge in this case, alleging the same violations of the Act as to other employees, was filed within six months of the discharge of Conner and Waggoner, and under the circumstances, "it was permissible for the second amended charge to relate back and define more precisely the original, timely charge." *N.L.R.B.* v. *Stafford Trucking, Inc.,* 371 F. 2d 244, 250 (C.A. 7), citing *N.L.R.B.* v. *Gaynor News Co.,* 197 (F. 2d 719, 721 (C.A. 2), affirmed, 347 U.S. 17, and *N.L.R.B.* v. *Epstein*, 203 F. 2d 482, 485 (C.A. 3), cert denied, 347 U.S. 912.[30]

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[29] Section 10(b) provides that "* * * no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ."

[30] The chronology of the events was as follows: the original charge was filed on June 29, 1964, alleging that Cox was discriminatorily discharged on June 22, 1964; on October 19, 1964, the first amended charge was filed, alleging that Cantalamessa and Jones were

It is well settled that a charge filed with the Board does not have to set forth in detail each act believed to violate the statute. As the Supreme Court has stated: "A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry." *N.L.R.B.* v. *Fant Milling Co.,* 360 U.S. 301, 307. Indeed, as noted in *Consumers Power Co.* v. *N.L.R.B.,* 113 F. 2d 38, 42 (C.A. 6), "the Act contains no specification of what constitutes a proper charge, save that it shall state that respondent has engaged, or is engaging in any unfair labor practices affecting commerce." Also, the function of a charge "* * * is not to give notice to the respondent of the exact nature of the charges against him * * *. The charge, rather, serves merely to set in motion the investigatory machinery of the Board. It is largely for the benefit of the Board, not the respondent, so that it may intelligently determine whether and to what extent an investigation is warranted. Consequently, the Board has considerable leeway to found a complaint on events other than those specifically set forth in the charge * * *." *Texas Industries, Inc.* v. *N.L.R.B.,* 336 F. 2d 128, 132 (C.A. 5). Thus, Section 10(b) of the Act "* * * has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which 'relate back'

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illegally discharged as of June 28, 1964; on July 7, 1965, the second amended charge was filed, alleging that Conner and Waggoner were discriminatorily discharged on June 28, 1964. The General Counsel issued a complaint on April 21, 1965, to include the discharges of Conner and Waggoner (R. 334-335; R. 3-9, 21, 26).

or 'define more precisely' the charges enumerated within the original and timely charge." *N.L.R.B.* v. *Gaynor News Co., supra,* 197 F. 2d at 721, and cases cited. Accord: *N.L.R.B.* v. *Stafford Trucking, supra,* 371 F. 2d at 249-250.

It is plain here that the second amended charge merely adds two additional discriminatees to those named in the timely first amended charge, and all were assertedly discharged by the Company because of the same circumstance, the closing of the weekday operation of the No. 2 crap table. Therefore, the second amended charge does not raise new and different issues, and the Board properly included the charges in the amended complaint. See, *Kansas Milling Co.* v. *N.L.R.B.,* 185 F. 2d 413, 416 (C.A. 10); *Texas Industries, Inc.* v. *N.L.R.B., supra,* 336 F. 2d at 132; *N.L.R.B.* v. *Reliance Steel Products,* 322 F. 2d 49, 53 (C.A. 5); *N.L.R.B.* v. *Raymond Pearson, Inc.,* 243 F. 2d 456, 458-459, and cases cited (C.A. 5).

2. Equally without merit is the contention (Br. p. 13) that the findings as to Conner and Jones are unsupported because they failed to testify. As shown above, credited evidence established that Conner and Jones actively participated in the union organizing effort and that the Company's motivation was not lawful in shutting down the operation of the No. 2 table and singling out four union adherents for discharge. The testimony of Conner and Jones was not essential to these findings: the sole issue to be resolved was the actual motivation for the discharges, and neither employee was competent to present direct evidence as to

that. See, *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9).[31]

Moreover, the law is clear that the Act seeks to protect public rights rather than private rights, and that the Board is empowered to proceed with a case even contrary to the desires of a discriminatee. *Nabors* v. *N.L.R.B.*, 323 F. 2d 686, 691 (C.A. 5), cert. denied, 376 U.S. 911. See, *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193, and cases cited. In the instant case, however, the failure of Jones to appear is fully explained. The hearing was held 14 months after Jones' discharge; in the interim he had moved to Ohio, and could not be located by the General Counsel in order to return to the hearing (R. 355; Tr. 5-7). Also, Conner was scheduled to be called as a final witness by the General Counsel, and was present outside the hearing room (there having been a sequestration of witness) for that purpose. But when the General Counsel sought to call Conner to the stand, he could not be located (R. 355; Tr. 7-10, 607, 613). In all the circumstances, we submit that the failure of Jones and Conner to testify in no way affects the Board's findings with regard to their discharges.[32]

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[31] Competence to present direct evidence of motivation distinguishes the Board's treatment of these employees' failure to testify from its treatment of Supervisor Chiara's failure to testify (Co. Br., p. 12). Chiara failed to testify as to whether he discharged Cox directly as a result of Cox's remark, a matter as to which Chiara had particular knowledge (*supra*, p. 28, n. 22).

[32] Nor is there merit to the Company's contention (Br. pp. 7-10) that the Trial Examiner was biased. As this Court recently noted in rejecting a similar contention, "[i]t has been pointed out by the highest authority that rejection of an opposed view, even when total, 'cannot of itself impugn the integrity or competence of a trier of fact.' *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 1949, 337 U.S. 656, 659 . . ." *N.L.R.B.* v. *Phaostron Instrument & Electronic Co*, 344 F. 2d

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue denying the petition for review, and enforcing the Board's order in full.

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JOSEPH C. THACKERY,
Attorneys,
National Labor Relations Board.

CERTIFICATE

The Undersigned Certifies that he has Examined the Provisions of Rules 18 and 19 of This Court and in his Opinion the Tendered Brief Conforms to all Requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

855, 859 (C.A. 9). Contrary to the Company's contention (Br. p. 8), the Examiner's statement that Conner may have failed to testify for fear of being blacklisted by other casinos is not evidence of bias (R. 355). Indeed, the Examiner used the very terms which Company President Gaughan expressed to employee Cox (Tr. 209-210), and it was entirely reasonable for the Examiner to conclude that Conner, a friend of Cox's and present at the hearing, would be aware of Gaughan's statement.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . .

within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . .

Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

General Counsel's Exhibits

No.	Identified	Offered	Received
1(a) through 1(o)	25	25	25
2	330	...	...
2(a) and 2(b) (identified above as "2")		340	340
3	341	...	...

Respondent's Exhibits

No.	Identified	Offered	Received
1	500	509	509
2	511	511	512
4 through 12	512-513	513	513
13 " 15	530-531	531	531
16 " 19	531-532	532	532
20 " 22	532-533	533	533
23 " 24	533-534	534	534

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